No. 3798.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of the Petition of the PACIFIC TOW BOAT COMPANY, a corporation, owner of the American Tug DEFENDER, for a limitation of liability.

PACIFIC TOW BOAT COMPANY,
a corporation,

Petitioner-Appellant,

vs.

DOMINION MILL COMPANY,
a corporation,

Claimant-Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Brief for Petitioner-Appellant

WILLIAM H. GORHAM,
Proctor for Petitioner-Appellant.

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STATEMENT OF CASE.

This is an appeal taken by the Pacific Tow Boat Company, petitioner-appellant, from the decree of the United States District Court for the Western District of Washington, Northern Division, adjudg-

ing that the claim of the Dominion Mill Company, claimant and appellee, in the sum of $2,875.00 together with interest thereon at six per cent per annum from December 12, 1918, be allowed; and giving judgment in favor of said Dominion Mill Company and against said Pacific Tow Boat Company and the Fidelity & Deposit Company of Maryland, surety on the stipulation for the appraised value of the petitioner's tug, in said sum of $2,875.00 with interest and costs, in a proceeding to limit the liability of petitioner, as owner of the tug Defender.

The Dominion Mill Company alone appeared as claimant and filed its claim and its answer to the petition, in the court below.

It is alleged in the petition and admitted in the answer:

1. That in December, 1918, the Canyon Lumber Company contracted to sell and deliver to the Dominion Mill Company, f. o. b., scow CLAIRE, then owned by the Canyon Lumber Company, at the latter's mill on the Snohomish River, 290 M feet of lumber and to charter to the Dominion Mill Company that scow and the use thereof for transporting said lumber to Port Blakeley.

2. That the Canyon Lumber Company de-

livered said cargo f. o. b. scow CLAIRE at its mill as agreed.

3. That the Dominion Mill Company requested petitioner to tow that scow and cargo from the mill on the Snohomish River to Port Blakeley, and pursuant to that request petitioner's tug DEFENDER took said scow with her cargo in tow from that mill in Everett bound for Port Blakeley, on December 11th, 1918.

It is further alleged in the petition but denied in the answer:

4. That said tug was seaworthy, etc., with sufficient power to perform the towage service requested.

5. That the tug proceeded with scow at 11 p. m. of December 11th, with a rising glass and smooth sea, from Priest Point, at the mouth of Snohomish River, for Port Blakeley.

6. That when the tug and scow were off Edmunds, a light wind and but little sea prevailing, the discovery was made that the scow had dumped part of her cargo.

7. That a large part of the cargo was picked up by petitioner, towed to Everett, and then impounded, and the Dominion Mill Company notified;

and that a part of the cargo was totally lost.

8. That the loss of cargo off the scow was without the fault, privity or knowledge of petitioner.

The prayer of the petition is, as usual, in the alternative, that the court adjudge petitioner and its tug not liable to any extent or at all for said loss and damage, or if found liable, that its liability be limited to value of tug and freight pending.

The answer sets up affirmatively:

1. That the tug negligently failed to use reasonable care in towing the scow, in that while in the Snohomish River the tug allowed the scow to come in contact with the bank of the river, cracking, straining and breaking the scow, causing it to leak, and notwithstanding the condition of the scow would have been disclosed upon examination, the tug failed to make such examination and proceeded into the waters of Puget Sound with the scow in damaged condition, with the weather unsafe for towing and failed to use reasonable care to keep the scow en route free from water but allowed her to become swamped and cargo to be dumped overboard, to the damage of claimant in the sum of $7,446.18.

THE ISSUES.

From the foregoing it will be seen that the issues raised by the pleadings were:

1. Want of privity or knowledge of petitioner as to loss and damage; and seaworthiness of tug.

2. Did the scow strike the bank of the river.

3. If so, did such impact cause the scow to leak.

4. The condition of the weather, wind and sea.

5. Was the tug negligent in the performance of the towage contract.

6. Seaworthy condition of the scow.

7. Damage.

REFERENCE.

The matter was referred to the United States Commissioner to take testimony and report the same to the court. No testimony was taken in open court.

Want of Privity and Knowledge of Petitioner, Seaworthiness of Tug DEFENDER.

Captain Jeffries, master of the tug, witness for petitioner testified that the tug was, at the time in question, in all respects properly tackled, ap-

parrelled, supplied, manned and equipped, had all the requirements of the law, was tight, staunch, strong, and seaworthy in every respect for that towage service, with sufficient power to perform that service, and had been duly inspected and that a certificate of inspection had been issued to her by the duly authorized officers of the Government. (Rec. 86, 87; Exhibit E).

McNealy, manager for petitioner, testified to the same effect and also to the effect that the petitioner was without privity or knowledge as to the loss and damage (Rec. 147).

This part of the case was uncontested by claimant; in fact the parties stipulated in writing, March 7th, 1921, (Rec. 22) that claimant waived proof by petitioner of the allegations of the petition and that no decree, if any, should be entered in favor of claimant or against petitioner in excess of the sum of $2,700.00, amount of appraised value of tug.

FINDINGS OF FACT.

On the issues the trial court found:

1. That the scow was seaworthy.

2. That the scow was taken by petitioner into open water and approximately 250,000 feet of lum-

ber was lost; something less than 50,000 feet delivered.

3. That there was no continuity of evidence as to the scow from the time of delivery (by the tug at destination) until the survey about ten days after, during which time she was on the beach.

4. That the scow collided with the bank of the river.

5. That the extent of the damage, if any, (to the scow by such collision) no one who testified saw.

6. That it must be concluded that either the running on the bank or the turbulent condition of the waters (of Puget Sound) occasioned the loss; and in either event the petitioner was at fault and should respond.

7. That the damage (to the salved lumber impounded at Everett) by reason of the rounding of the edges of the square timbers could not be compensated in the manner indicated (by labor of one man for one day).

8. That damage to claimant is more than twice the appraised value of the tug.

9. That cost of reconditioning the (salved) lumber and difference in value, it being a special

order, and place it either at point of shipment or destination, would be as much at least as the value of the tug and that for such expense the claimant could recover in any event.

10. That it was the duty of petitioner to deliver the cargo at Port Blakeley and it could not relieve itself from liability by placing the timbers in a boom at Everett and notifying the claimant of that fact.

11. That under the statute for limitation of liability, the liability should be limited to the value of the tug.

SPECIFICATION OF ERRORS RELIED UPON.

I.

Did the scow strike the river bank?

The 3rd Assignment of Error.

II.

If the scow struck the bank, did such impact cause it to leak?

The 1st and 4th Assignments of Error.

III.

Was the loss due to the turbulent condition of the waters of Puget Sound?

The 4th Assignment of Error.

IV.

Was the tug negligent in the performance of the towage service?

The 5th Assignment of Error.

V.

Seaworthiness of the scow.

The 1st and 2nd Assignments of Error.

VI.

Duty to tug under towage contract.

The 7th Assignment of Error.

VII.

Damages.

The 6th, 8th, and 9th Assignments of Error.

VIII.

The decree.

The 10th and 11th Assignments of Error.

POINTS OF LAW AND FACT.

I.

Did the Scow Strike the Bank of the River?

As to the 3rd Assignment of Error:

The substance of the claimant's testimony is that the scow went *up against the bank* of the river.

Claimant's testimony in detail is:

Stafford Wilson, employe of the Canyon Lumber Company:

> (From the mill dock) Did not watch the tug make fast to the scow (Rec. p. 30); started toward the mill, stopped and looked at scow—she was on the bank of the river, *up against the bank* of the river (Rec. p. 30-31)—saw her *against the bank, she was moving* (at the time), *don't know whether she was moving with the current or with the tug;* it seemed to be mixed up in some way; could not say how long she was there—I just looked a few minutes. Could not state how long she was—I turned and went to my work (Rec. p. 31), could see the scow and tug, I should judge a quarter of a mile where I seen her ashore (Rec. p. 32); quarter of a mile, somewhere in that neighborhood (Rec. p. 36); scow *struck* the right bank of the river; couldn't say which end the tug was on or whether she was on the side at that time; couldn't say whether or not the tug was between witness and the scow; watched three or four minutes; think she was up against the bank; couldn't say that she seemed to be in any distress (Rec. p. 37).

Percy Ames, employee of Canyon Lumber Company:

> I saw the scow at the bank (Rec. p. 43), saw them *when they ran up to the bank;* distance from the mill hard to guess, but I should think it was close to quarter of a mile, it might have been less. Don't remember on which side she was being towed by the tug but it would put the scow *against the bank;* stayed there until they had *released* her from the bank; she might have been there a minute or half a minute, hard to remember—I know they *just swung around to the bank and went down the river;* saw her go *up against the bank;* just at that time he was stopped; he was practically in, really broadside, he was two-thirds broadside to the river when he *touched the bank;* after he *touched the bank* he got right around, he did not stop any more than to square himself in the river and go again (Rec. p. 43). It was high water, just started to ebb (Rec. p. 44); photo, Exhibit B, discloses the place where the scow went *up against the bank,* it takes in sufficient scope of the river to include the place where the scow came up against the bank; in the photo, Exhibit C, the arrow points to where the scow came against the bank (Rec. p. 44).

This is claimant's entire case as to the scow striking the bank. It offers no testimony as to the force of the blow or impact, as to any rebound from that blow, or imbedding in mud or impinging on a snag, such as to require a "pulling off," or noise or report as to crashing timber, or swaying of the pile of lumber on the scow, or excitement or scurrying around on the tug.

Claimant's case, at most, discloses what is known among mariners as a case of "touch and go."

The substance of petitioner's testimony is that the scow did not touch the bank at all.

Petitioner's testimony in detail is:

Captain Herbert Jeffries, master of the tug:

> Never came in contact with the bank at any time. The only trouble when you get alongside the scow is you shove ahead, and there is a tendency to shove sideways to a certain extent, but the tail end of the scow load rubbed the tree limbs that overhung the bank of the river, that is the load, the load of lumber on the scow (Rec. p. 89). If the scow had come in contact tact with anything I certainly would have known it. You take a loaded scow and if it comes in contact with anything that has a tendency to stick, it will break the lines of the boat (Rec. p. 89) * * * This line leading aft, you push her along (with), and if she comes in contact with anything it will break that line every time, don't make any difference how big the line is. The line was not broken that time. Most certainly would have known on the tug whether or not the scow came in contact with the bank if the blow or contact or impact was sufficient to raise the guard of the scow when she was loaded (Rec. p. 90). Am positive I hit nothing coming down the river from Canyon Lumber Company's mill to Priest Point. The only thing, as I stated before, that lumber hit the limbs of the trees on the stern end; neither scow nor tug came in contact with any obstruction from the mill to Priest Point; didn't come in contact with anything to notice, to do any damage;

if we had it would have showed some effect by 11 (p. m.) while lying at Priest Point (Rec. p. 93). Going down stream from the mill tightened his lines. When I stopped to tighten the lines then she drifted in the stream some distance, yes. I backed up the boat, stopped the headway of the scow to a certain extent—width of slough 225 feet, width of scow 32 feet, width of tug 22 feet. Plenty of room in middle of stream to navigate with scow at her side (Rec. p. 96). The aft end of the load scraped the trees as we went along. Was standing in stream crosswise or at an angle of 45 degrees, should judge, not more than five minutes. If I struck the bank with the scow the line I was pulling on would break. If the line was not tight it would have a greater tendency to break. It would break quicker. You would have the boat going, and the scow coming back, at the same time. Cannot slack the boat without slacking my line and hold the boat there. Had a man on top of the load (on the scow) (Rec. p. 97).

Harry Garner, in tug's deck department:

(Upon leaving mill dock) After taking in slack, was up on that load on the scow for purpose of watching * * * to keep an eye on anything, to be a lookout; just as soon as we tightened up the lines * * * then I climbed on top of the load immediately; we were (then) not very far off from midchannel. Don't think scow had at any time previous thereto been near the bank of the river. There was contact with trees on the bank, naturally brushed the trees; on a boat running light we would do that. Of course we did. *The scow did not come in contact with any obstruction at any time from the mill to Priest Point* (Rec. p. 131).

It will be borne in mind that the witnesses for claimant were viewing the movement of tug and scow from the dock of a mill, which, according to their own statements, was at least a quarter of a mile from the place where they say the scow went up against the bank; and further, that the tug and the scow with an eight-foot load on her were between those witnesses on the mill dock and the particular place in the bank of the river they say the scow touched.

Not only has the claimant failed to sustain the burden of proof, but the scales tip in favor of petitioner.

The evidence of the surrounding circumstances, as will be seen as our argument develops, substantiates the positive testimony of petitioner's witnesses that the scow did not strike the bank of the river.

II.

If the Scow Struck the River Bank, Did Such Impact Cause It to Leak?

As to 1st and 4th Assignments of Error:

That the scow en route from Priest Point to Port Blakeley leaked is admitted, but the imme-

diate question is, was that the result of the scow striking the bank.

Claimant's evidence was to the effect: That the loaded scow went up against the bank (though which end of the scow touched the bank its witnesses say they do not know); and that a fortnight after the scow was delivered at Port Blakeley, to claimant, with no continuity of evidence as to the scow from the time of such delivery until such survey about ten days after, during which time she was on the beach—as the trial court found (Rec. p. 154). Claimant's survey of scow disclosed a damaged condition; and that such damage was confined to the stern of the scow and adjacent to the stern; from which (notwithstanding that as to the force with which the scow struck the bank, Wilson, its witness, didn't know whether the scow was moving with the current or with the tug (Rec. 31), from which, we say, claimant would have the court draw the conclusion that the damage was caused by the scow striking the river bank.

It is significant that no showing is made by claimant as to what care the scow received at its hands at Port Blakely during that fortnight (Dec. 13th to 26th), when the scow was in its custody, though that port was the place of claimant's opera-

tions as a manufacturer and exporter of lumber, and the degree of care or negligence taken of the scow was peculiarly within the knowledge of claimant.

As petitioner's evidence, as will be seen, showed that the scow went down the river, from mill to Priest Point and thence to Port Blakeley, bow first, in tow of the tug, it becomes pertinent to inquire: What was the condition of the scow at Port Blakeley and upon its return to Everett, and where the openings in scow were located.

Claimant produced three witnesses, Clark, Johnson and Hancher, who saw her on the beach at Port Blakeley, and who testified as follows:

Clark, lumber inspector:

> Saw scow on beach, they were draining water out of it; the Jap held a lantern down through the hatchway and you could see the light shining through the crack, on the corner, in the top seam, crack 2 or 3 feet long; shoved my ruler through it (Rec. p. 25); it was at night time when I saw the scow on the beach; didn't examine her, but saw this, an open seam on one end of the scow, top seam, 14 or 15 inches from top of scow; that was the only seam he saw (Rec. p. 26), ran lengthwise of the scow (Rec. p. 27).

Johnson, boat-builder:

> At time I went down to examine this scow there was 3 or 4 feet of water on outside, at least

18 inches in hold; had a skiff and went all around scow; found on one corner oakum was out of there, and some seams were open at least three-quarters of an inch (Rec. p. 81); it was a little way inside, the guard was tore off from one end and whole of the oakum was out, 3 feet long and that is on side of scow; on the end of the scow, same end, there was an opening but not quite so large, and I could see along this opening probably 2 feet that oakum was entirely out and it was an open hole; didn't examine inside of scow—looked down hatch is all; had no occasion to look inside of bulkhead, was looking at outside where water might have gone into scow; found that and I thought that was enough to sink a scow at the time she was out; couldn't tell whether this opening had been caused by pressure from within or without, most likely it had (*sic.* Rec. p. 82, line 18); the sea was so big and the oakum was loose, it would have come out very easy with the pressure of the storm, or anything from outside would pull it right out. Couldn't tell whether this opening in seam had been caused by something from without, by the water striking it from without (Rec. p. 82).

Offers copy of his written report on survey.

The seam on side was probably 4 or 5 inches below the guard, 15 or 16 inches below deck (Rec. p. 82); no doubt the scow was well constructed when she was built, but as I say the scow had got to be quite an old scow and I think that the planks had pulled apart and caused this opening, can't tell how or when, but they pulled apart; in places where the planks, you see there they get kind of worked down and the corners kind of broken off, *enough to take water in if awash;* couldn't say there was any

indication from examination at that time that she was in collision with bank of river or some resisting mud, with some obstruction in her navigation, that caused her to open her plank (Rec. p. 83).

Hancher, launch man:

(At Port Blakeley) I moved the scow from the dock over there to the beach. She was full of water and put her alongside the grid-iron or a bunch of piling on the beach there, a gravel beach; and she lay right in front of my house (Rec. p. 66).

Went down and examined the scow; never made a thorough or close examination. Saw several seams open and water running out. Noticed seam open at one end and also several seams that were open at that time in making examination and when we looked at her just supposed scow had become full of water lying on the beach, force of water inside had forced the caulking out. Sometimes water inside will push plank off. Noticed one place close to bottom seam, seam was 4 or 5 feet, caulking out at that time (Rec. p. 66); also seam at corner; a big seam along about close to bottom, about middle of scow (Rec. p. 67).

Scow caulked (at Port Blakeley) before they returned her and those seams fixed up before they returned her to the mill (at Everett) (Rec. p. 71).

I noticed the scow had several seams open in different places, and what I believed at that time was that the caulking had been forced out from the scow after she was put on the beach (Rec. p. 70).

If he hit the bank with the corner of the

scow, then he has got to stop right there; and the current running at that time, after high water, the current running down stream, the scow turned around and came bump up against the bank sideways; that would not have force enough, I should think, to hurt the scow any, the sides of the scow are very thick, probably 6 or 8 inches thick (Rec. p. 68).

I would state that if the scow came in contact with the bank, headed down stream, or if headed toward the bank, that scow has a shear on her or cut-away underneath, and it would be very apt to come in contact with the bank above the water line (Rec. p. 69).

Q. And what tendency would that have on that scow, loaded with 294,000 feet of lumber, could you tell?

A. Well, you might run into the bank a dozen different times and each time you would have a different effect on your scow. It all depends upon what the scow would come up against (Rec. p. 69).

In addition to this testimony, claimant offered further evidence of the scow's condition on her return to Everett, as follows:

Stafford Wilson, employe of Canyon Lumber Company:

Made an examination of scow after her return to Canyon Lumber Company; fixed her; she had a crack opened up in front, in corner, in one of the corners; opened up about 10 feet, 3 or 4 inches wide (Rec., p. 32).

Q. Just an opening in a seam so as to

make a seam in the scow or was there *any bruising of timbers* in there that showed evidence of having been split or broken?

A. No, it was in the caulking where the opening was; about 15 inches from the top of the scow (Rec. p. 32).

One end of her was all cracked in; ten feet from end of scow back, 15 or 18 inches below the deck, some timbers split inside, one of the gunwales in there; the first one inside there was a timber split about 30 or 40 feet back, the same end where the opening was on the outside, new split; split timber is in there (Rec. 38); remains in scow, not split from driving drift bolts through; I suppose there was some strain or something; that would be the only way it could be done, some strain; and these spikes would naturally on one half of the wall, would split the timber; this open seam on outside and this split of gunwale on inside of end of scow that had the open seam, was the end that had the name on stern of vessel, across the end of the vessel (Rec. p. 39); don't know how long scow lay on beach at Port Blakeley or how they handled her there; haven't any personal knowledge that the injury I saw was due to the fact that she went up against the bank (Rec. p. 40); cause of opening he saw, there might be a good many causes; if she got on a bar, was heavily jammed into something with heavy load on; don't know, quite a few things; not by wash of the sea (Rec. 41); know the river bank has soft places, lots of drift wood comes down there; could not say whether it was filled with drift at that time (Rec. 42).

Recalled:

Shown photo, Exhibit D, marks Exhibit D

with red ink, indicating where crack was when scow returned to Canyon Mill (Rec. 46); also indicates where gunwale was split (Rec. 47).

Cement shown in Exhibit D, considerable distance below place where seam was (Rec. p. 48).

Percy Ames, employe of Canyon Lumber Company:

(When scow was returned to Canyon Mill) Saw the crack in her; cannot remember exactly just what he saw; knows there was a raised deck for a number of feet; the opening in her was something that would be plainly visible from outside of scow, if you were down low enough to look at it; could see the scow was raised up; doesn't think they could see the crack unless on same level with the scow (R. 44).

In photo, Exhibit D, the bow of the scow in the foreground is the end of the scow he subsequently saw in damaged condition, the end that has name on it (Rec. p. 45).

W. C. Niemeyer, lumber inspector at Canyon Mill:

We try to get a rake (on scow in loading) of 3 or 4 inches to tow, one end a little higher than the other.

No such thing as head or stern (of scow). We load them whichever way they come in; and he (tug) will hook on to what I would call the light end, have that in front (Rec. p. 50).

(On return to Everett) I found there was a break in the end, the header lifted up, a header is a 14-16 (Rec. 51), that was lifted up

on this front where the cargo is, and around the end, ten or twelve feet on the side and on the end; a distance of 10 or 12 feet on the side, a distance on the end of 6 or 8 feet (Rec. pp. 51, 52); noticed one of the bulkheads was lifted up also—the gunwale—wouldn't say broken, but split, lifted up—didn't notice whether broken, lifted up 20 or 30 feet (Rec. p. 52).

Opening in end could be plainly seen from outside of scow, if you were down on a level with it, you could see it; if you got down and looked, that is the only way you could see it; you would have to lay over the end of it; would not say you could see it plainly (Rec. pp. 52, 53).

Cannot say there was a split in the timber (gunwale); there was an opening in that seam (Rec. 55); I still say there was an opening in that timber 30 or 40 feet long, cannot say whether split, would say crack (Rec. p. 56); the end of the scow that was damaged was the "name end" (Rec. p. 56).

McNealy, manager for petitioner, who went down in the scow with Niemeyer in the spring of 1921 (Rec. pp. 148, 149), according to his own testimony and that of Niemeyer (Rec. p. 55), requested Niemeyer to show him the crack in the gunwale; says that he made a special examination to discover the crack and found none, none was pointed out to him by Niemeyer, and that there was none there (Rec. p. 149).

And this failure of Niemeyer to direct McNealy's attention to the alleged split timber was

not for the reason that there had been any renewal or changed condition of that gunwale or its timbers, no such reason is in evidence.

Niemeyer's testimony itself was self-contradictory and unsatisfactory. He denied remembering what his testimony had been on a former trial in an action in the state court between the Canyon Lumber Company and the claimant, involving the loss of this same cargo, as the result of which suit the Dominion Mill Company was obliged to pay for the entire cargo of lumber (Rec. p. 110). The following extract from his testimony will disclose his attitude and the probative value of his testimony:

> A. I don't remember these records (of former trial).
>
> Q. I am going to ask you each question and you can answer.
>
> A. I cannot answer anything there. I answer what comes up now.
>
> Q. I want to know if you remember this—
>
> A. I don't remember it. * * *
>
> Q. The next question, "Q. Was that a split in the timber itself? A. Yes sir." * * *
>
> A. Do I have to answer this?
>
> Q. Yes.
>
> A. I cannot recollect what I testified to (Rec. 54).

Whatever the condition of the scow was at Port Blakeley, whatever her condition was on her return to Everett, the claimant's witnesses, Wilson, Ames and Niemeyer, all fix definitely that the crack on the side and the hole in the end of the scow was as indicated by Wilson in photo, Exhibit D, at the end of the scow where the name is (technically known by the Custom House as the stern, Hancher, Rec. p. 77), and on the port quarter of the scow looking forward from that stern, and that the alleged split gunwale was at the same end and side.

That is to say that all the damage to the scow as shown by claimant was at and near the stern.

We submit that with the weight of 290,000 feet of lumber on the scow, any blow or pressure on the stern would have broken the timbers of the scow before it would have lifted the header with the weight of that cargo on that end (right on the floor of the scow, Rec. p. 93); but Wilson for claimant testified that there was no evidence of bruising of timbers of the scow where the seams were discovered opened.

In view of this testimony as to the location of the damage to the scow, it becomes important to determine which end of the scow went down foremost, when the tug took her in tow alongside at Canyon

mill, which end was down stream in towing.

Besides the name on the stern of the scow, the name of the scow was also painted on each side of the scow, on the corners, on the bow end or other end of the scow (Wilson for claimant, Rec. p. 34).

For the claimant:

Wilson testified:

He didn't know how the scow was headed, with respect to name on her stern as she hit the bank (Rec. pp. 36, 37) or when towed away (Rec. p. 40).

Ames testified:

He didn't observe which end where the name is on the scow or whether that was headed down stream (as she was towed away from Canyon mill) (Rec. p. 43).

Niemeyer testified:

He didn't notice when the scow was loaded at Canyon mill which end with reference to name on scow was headed down stream; did not pay any attention to that, on account of both ends being the same (Rec. 50).

For the petitioner:

Jeffries, master of the tug, testified:

When I went up to the mill, the first thing I naturally would do would be to look amongst the scows and see where the CLAIRE was; found her lying along the dock, at this dock;

noticed the name on the up-stream corner of the scow, and I went alongside—high end of scow was up-stream; made fast alongside of her and took her on my starboard side, and I pulled her out of there and started down stream (Rec. p. 87); the boat was alongside the scow; left the mill, at top of high water, slack water (Rec. p. 88).

Garner, for petitioner, testified:

Scow lay in a little notch in wharf (Rec. p. 129) (see Exhibit A); approached the scow on tug's starboard side; bows of tug and scow pointing in same direction; end of steamer was not as far up as the up-river end of scow (Rec. p. 129). Diagram G indicates relative position of tug and scow and how made fast by lines (Rec. pp. 129, 130). In this position, with these lines out, the scow was moved from its berth at the dock by the tug; and the relative position of the lines was not changed until they got to Priest Point. Saw the name on the end of scow in tightening up the stern line, the name CLAIRE; we stopped down there to shorten up our lines and we shortened up on our headline and sternline, and I had to step over to the starboard to shorten this line, and I noticed there was a name on there (Rec. 130). End of scow opposite to the end with the name on, was always forward in towing, either alongside or by line (from mill to Port Blakeley) (Rec. 132).

Barkman, master of CHICAMAUGA, for petitioner:

That immediately after the accident, he was called to the tug and found the towing bridle made fast to the towing bitts at the bow of the

scow, at the end with the name on the side (Rec. p. 144).

These statements by Jeffries, Garner and Barkman on the point under immediate consideration are uncontradicted and unimpeached.

Assuming for the sake of argument, that the scow did strike the river-bank, it must have been with her bow end; and for the bow striking the bank to have the effect of lifting the header on the stern of the scow with the weight of the cargo on that end, and of causing the other damage at the stern, would be against physical laws.

With all the damage sustained by the scow at the stern and on her port quarter, abaft midships on the port side, and with the scow being towed bow first down stream, whatever the findings of the court as to the scow striking the river bank, the court must find, in view of claimant's affirmative showing that it couldn't be told from the dock whether the scow was moving with the current or with the tug, and in view of the absence of any showing as to the force with which the scow struck the bank, if she did so, the court must find that there is no evidence in the record that damage was sustained by the scow by reason of such impact with the bow of the scow.

The burden of proof is on the claimant.

An engagement to tow does not impose either an obligation to insure, or the liability of a common carrier. The burden is always upon him who alleges the breach of contract of towage to show either that there has been no attempt at performance, or that there has been negligence or unskillfulness to his injury in the performance. Unlike the case of common carriers, damages sustained by the tow do not ordinarily raise a presumption that the tug has been in fault.

The Steamer Webb, 81 U. S. 406, 414.

The Propeller Burlington, 137 U. S. 383.

Owners of tow and cargo cannot maintain an action for loss against a tug or her owners without proving negligence. The damage to tow or cargo raises no presumption against the tug.

The J. P. Donaldson, 167 U. S. 599.

We submit that the burden of proof was not sustained by the claimant.

III.

Was the Loss Due to the Turbulent Condition of Waters of Puget Sound?

As to the 4th Assignment of Error.

Condition of Wind and Sea, in Waters of Puget Sound. The Wind:

Hancher, launchman, for claimant, testified:

Left Port Blakeley that night he thinks at

one o'clock in the morning (Rec. pp. 72, 74); some time around one o'clock, maybe a little later (Rec. p. 73), doesn't remember the exact hour (Rec. p. 63); took three or four hours to get down (to Everett) (Rec. p. 72); got there about four or five o'clock in the morning, he believes, if he remembers right (Rec. p. 64).

(Coming out of Port Blakeley) It was blowing quite hard, should judge somewhere in the neighborhood of 20 miles an hour, possibly more; know that with my tug I would not attempt to go out in a wind like that was blowing at that time (Rec. p. 64).

The tug DEFENDER is probably 150 horsepower; mine only a gasoline boat of 76 horsepower; the DEFENDER *would be able to pull against that wind all right, with the scow and load* (Rec. p. 64).

At Edmunds blowing a gale of wind (20 miles is a gale if a man is trying to tow a scow up against it) (Rec. p. 72). The scow wouldn't necessarily stand up against that storm as long as the tug (Rec. p. 72).

Had been blowing hard at Port Blakeley (one o'clock that night, or maybe a little later) —blowing hard when I arrived at Everett, same as in Blakeley when I left. My opinion the storm was continuous throughout Puget Sound district; that there was a strong wind (Rec. p. 73); with a tow in such weather I would have tied up at Mukilteo. (Rec. p. 74).

Salisbury, of U. S. Weather Bureau, for claimant, testified:

(At the time in question) Weather conditions were the same in Everett as they were in

Seattle; barometer would be the same (Rec. pp. 120, 121).

Official weather report, of Dec. 11th, Exhibit 1:

No storm signals ordered for the 11th (Rec. p. 122)—

Velocity of wind at Seattle midnight of 11th, 13 miles;

At 1 o'clock a. m. of 12th, 15 miles.

At 2 o'clock a. m. of 12th, 16 miles.

At 3 o'clock a. m. of 12th, 15 miles.

At 4 o'clock a. m. of 12th, 10 miles.

At 5 o'clock a. m. of 12th, 8 miles

At 6 o'clock a. m. of 12th, 7 miles (Rec. p. 123).

Dec. 12th was a cloudy day with light rain, low fluctuating barometer and temperature above normal. A general south wind prevailed, at times from S. E. Highest velocity 34 miles an hour from south at 10:45 p. m. Average hourly velocity or movement, 10.4 miles; S. W. storm warnings displayed 8 a. m. for ensuing 24 hours (Rec. 100).

Jeffries, master of tug, for petitioner, testified:

Laid at Priest Point until 11 o'clock at night, and tide being right, I pulled out; at that time there was no sea, no sea a man would stop with a scow, a little chop, nothing to amount to anything (Rec. p. 88); wind 15 to 20 miles an hour (Rec. p. 89), 12 to 15 miles (Rec. p. 100); glass between 29.85 and 30, about 29.90 to be exact (Rec. p. 89). From time I left Canyon Mill, glass had tendency to rise slowly;

reached its highest point 11 o'clock p. m., when I pulled out (Rec. p. 89).

No storm signals at Everett (Rec. p. 95); had a barometer on board (Rec. p. 98); glass slightly rising (Rec. pp. 98, 99); if you have an ebb tide running out of Everett against 30 mile S. E. wind you will probably have a pretty good chop, but if you have a 35 or 40-mile wind with flood tide, blowing into Everett you probably would have no sea at all (Rec. pp. 99, 100).

Tug DEFENDER'S work sheet for the trip, Exhibit 2, shows:

Dec. 11th.

13.00 o'clock Tied scow to Priest Point dock, wind stiff S., bar. 29.80.

23.00 o'clock Left Priest Point with CLAIRE.

Dec. 12.

00.0 o'clock At edge of flats)Fresh 29.86
6.00 o'clock Highlands abeam)Stiff S E29.60

The Sea:

Jeffries:

At Priest Point that night there was no sea, a little chop)Rec. p. 88).

Hancher:

Q. Was the *water* on that night such as would make it dangerous to tow a scow such as the CLAIRE, loaded with lumber?

A. I know with my tug I would not attempt to go out in a *wind* that was blowing at that time (Rec. p. 64).

Q. With the wind such as you experienced on leaving Port Blakeley, would you say that

it made a *sea* such as was not safe to tow in?

A. It was not safe to tow that night, not with a loaded scow, that night (Rec. p. 74).

Wouldn't state how long wind had been blowing before he left Port Blakeley; doesn't remember whether it was blowing all night or not; doesn't remember whether the wind came up suddenly at one o'clock or had come up before (Rec. 74).

With the wind and tide in same direction, there was no heavy sea (Stipulation, Rec. p. 146).

There is no evidence of a wind of any force prevailing in the early evening of Dec. 11th, prior to eleven o'clock. p. m.

The wind at 11 p. m. was blowing 13 miles an hour, increasing to 16 miles at two o'clock and thereafter constantly decreasing in velocity to 8 miles at five o'clock and to 7 miles at six o'clock on the morning of Dec. 12th (Rec. p. 123).

There is no evidence of any unusual sea running at 11 p. m. from any previous prevailing wind, or between 11 p. m. and 5 a. m. further than the *opinion* of Hancher, a gasoline boat operator, when questioned as to the sea made by the wind, that it was not safe to tow that night with a loaded scow; but he also was of the opinion that the tug DEFENDER would be able to pull that scow and cargo against

that wind all right (Rec. p. 64).

Captain Jeffries, master mariner, says there was a fairly good sea on, but no sea that scow should not have lived in; had taken scows through seas a whole lot worse than that from Union Bay, B. C., to Seattle, loaded just as heavy with coal, many times (Rec. pp. 107, 108).

Between 11 p. m. and 5 a. m. the tide in the waters of Puget Sound was ebbing (Stip., Rec. p. 146). The ebb flows to the south from Saratoga Passage and Port Susan through Possession Sound, but to the south of Possession Sound and thence on to West Point and south of that the tide ebbs to the north; from a point south of Double Bluff (Skagit Head) to Richmond Beach, a distance of, say, six miles, the tide had been ebbing since 11 p. m., in the same direction in which the wind was blowing, to the north, and in these waters, with the wind and tide in the same direction, there would be no sea kicked up (Stip., Rec. p. 146).

When the tug and scow were coming away from Priest Point, the wind and tide were in opposite directions, which caused a choppy sea, as testified to by Captain Jeffries (Rec. p. 88); but when well south of Double Bluff, coming south, the wind and

sea were going in the same direction, as explained above.

Hancher, for claimant, testified that on his way from Port Blakeley to Everett that night, when he got to Edmunds he noticed lumber all over the water, and lumber from there to Mukilteo Bay (Rec. p. 64).

Edmunds was half way to Everett from Port Blakeley (Rec. p. 72).

This would bring him at Edmunds about three o'clock a. m. if there was any certainty in the time given by him as to his departure from Port Blakeley and his arrival at Everett; but he is very uncertain as to both departure and arrival; says that he doesn't remember the exact hour he left Port Blakeley (Rec. p. 63) and that he got to Everett about four or five o'clock, he believes, if he remembers right.

However that may be, from his testimony it may be inferred that the lumber had been spilling for some little period of time before the lights on the scow disappeared, or else it had all spilled south of Edmunds and had drifted north with the combined force of wind and tide, setting north.

It was between five and five-thirty in the morning when the tug found the load had gone off the scow (Rec. p. 91); Garner had seen the lights on the

scow some fifteen or twenty minutes before (Rec. p. 136); they were then off Richmond Beach, 18 miles from Priest Point (Rec. p. 100), and had been in water, where there would be no heavy sea running, for two or three hours.

We submit that the record shows no stress of weather, of wind or sea, such as to account for the disaster which befell the scow between 5:00 and 5:30 on the morning of December 12th (Rec. p. 91).

As we said under Point II., the burden of proof was upon the claimant.

The Webb, 81 U. S. 406, 414;
The Burlington, 137 U. S. 383;
The J. P. Donaldson, 167 U. S. 599.

This burden was not sustained by the claimant.

The trial court without finding specifically that the damage to the scow causing her to leak and thereby lose her cargo, was caused by the scow striking the bank of the river or by the turbulent waters of Puget Sound, did find that in either event the petitioner was at fault and should respond, which is but to say, given the premise in the alternative, the conclusion follows.

But there is no evidence of any damage to the scow caused by its striking the bank and the court

was not able to, or in any event did not, so find the fact to be.

Nor did the court find that the damage was caused by the turbulent waters. It did find that the scow entering the open waters of Puget Sound, the lumber cargo was lost.

Here again the court met with a difficulty. It could not, or in any event it did not, find that the turbulent waters were the cause of the damage to scow.

But having found the scow seaworthy (which finding we discuss under Point V.), it appears to have drawn the inference that the damage to the scow was due either to the one cause or the other, and that in either event the petitioner was at fault and should respond.

We submit that, without a preponderance of the evidence in favor of claimant, that such damage was actually due to the one cause or the other, no inference can be substituted for such evidence and that no conclusion of fault of petitioner can rest upon a mere inference.

The burden being upon the claimant, it is incumbent upon it to satisfy the court by evidence having a greater weight than that offered by the peti-

tioner, that the negligence of the tug occasioned the damage complained of. Where there is no way of ascertaining, with any degree of certainty, that the tug caused the damage, to say that she did so would be to substitute inference for proof. The strongest statement permissible under the evidence is that she might have done so. But speculation and conjecture have no place in an investigation of this character; and where the proof is evenly balanced between two theories, it is quite clear that claimant cannot recover.

The Nellie Flagg, 23 Fed. 671.

In *The R. B. Little,* 215 Fed. 87, C. C. A., 2nd Circuit, a case of damage to a tow, the court said:

> It seems to us that the burden is on the libellant to show some negligence on the part of the tug and that until this is done, the burden of proof does not shift. There is nothing in the testimony here to show that the tug was guilty of fault. It is all left to guesswork and speculation. The argument is that the barge was injured at some time, probably while being towed by the tug; ergo, the tug is liable. In other words the tug may be held liable for an injury which she did not cause or aid in causing. No one knows or pretends to know how the injury was caused and until some proof is produced that the tug caused it, it seems to us she should not be held liable. The rule laid down by the District Court practically makes the tug an insurer.

As was said by the court in *Grant vs. R. R. Co.,* 133 N. Y. 659, 31 N. E. 220,

> No facts are shown from which the cause of the accident can be more than guessed at. There is food for speculation and wonder, but there is no evidence as to the cause.

Cited in Chi., etc., Ry. Co. vs. O'Brien, 132 Fed. 593, with other cases.

IV.

Was the Tug Negligent in the Performance of the Towage Service?

As to the 5th Assignment of Error:

The negligence charged by claimant in its answer is:

1st. The tug allowed the scow to strike the river bank, thereby cracking, straining and breaking the scow.

2nd. Failure on part of tug to examine the condition of the scow after so striking, which examination would have disclosed that the scow had been so cranked, strained and broken.

3rd. Failure on part of tug to keep the scow free of water.

As to the first charge, we have discussed that under Points I. and II. of this brief.

As to the second charge, failure to examine scow,

Jeffries, master of tug, testified:

We sounded the scow at mill, found 3 or 4 inches of water, not enough to enable siphon to lift it (Rec. p. 90).

(At Priest Point.) Didn't sound again, but she was apparently in the same condition as when I left the mill (Rec. p. 91).

(At Priest Point.) This scow was apparently in the same condition leaving Priest Point (11 o'clock p. m.) as when it arrived there in the afternoon (1 o'clock) (Rec. p. 92).

I walked around the side of her, along the outside of her, with a light to see if there had been any change, see which was the high or low end and see whether she had gone down any at the low end (Rec. p. 92).

Her freeboard was 26 inches at high end, and 20 or so on low end, 6 inches difference in two ends (Rec. pp. 92, 93).

Made no examination of scow before I made fast to her (at mill), took her in just whatever condition she was left there for me, assumed it was good, seaworthy condition from what I could see and the way the scow was loaded (Rec. p. 99).

Never observed anything wrong (en route from Priest Point), never made any investigation till he saw the light go out. When the light was gone I went back and looked at her and the load was gone (Rec. p. 105).

Perkins, for petitioner, testified:

> Was within 400 or 500 feet of scow at Priest Point. Took particular notice, she seemed to be setting on a level keel all right (Rec. pp. 85, 86); about 3 o'clock in the afternoon couldn't see them working any pumps (Rec. p. 86).

Garner, for petitioner:

> Condition of scow at Priest Point same as at mill (Rec. p. 132).

As to the third charge, failure to keep scow free from water:

Claimant in its answer, Paragraph VI., affirmatively alleges that the tug negligently failed to use reasonable care in handling the scow, in that while towing it down the Snohomish River, the tug allowed the scow to come in contact with the bank of the river, thereby cracking, straining and breaking the same and causing it to leak, and, notwithstanding the condition of the scow, which would have been disclosed by examination, the officers of the tug failed to so examine the scow and proceeded into the waters of Puget Sound with the same in such damaged condition when the weather was unsafe for towing, and failed to use reasonable care to keep the scow while en route (in Puget Sound) free from water.

The gist of the charge, it will be observed, is that through the tug's negligence the scow struck the river bank and sprung a leak, and in that leaky condition of the scow the tug proceeded with it into the waters of Puget Sound, where the weather was unsafe for towing, and failed to keep it free from water.

It was not the weather or the turbulent waters produced by that weather which is charged as causing the leak.

The weather and turbulent waters of Puget Sound only enter as elements swamping a leaky vessel subjected to them.

The premise in claimant's contention is always the leaky scow, made so by contact with the bank of the river through the tug's negligence.

That the scow leaked and swamped there is no dispute.

The cause of that leak was not shown by the evidence to have been caused through any negligence of the tug.

That premise of claimant was not established by any evidence whatever.

Having examined the scow at Priest Point and

finding her all right, the tug at the proper tide passed out of the river into the waters of Puget Sound en route for destination.

He then pursued the course which Hancher, witness for claimant, said was proper, went on without further examination, impossible en route.

Hancher, for claimant, testified:

> If I had known the scow was all right when I left the river, if I could see the scow after I was out, was outside the river, I would say the scow was all right, if I did not see a list in her (Rec. p. 64).
>
> A man would never out in weather like that, towing on a night like that, know whether she was leaking or not. You cannot see the scow (Rec. p. 74).
>
> A man in towing a scow, he generally has it anywhere from 300 to 500 feet of tow line fast to her and he starts out knowing or considers she is seaworthy and he tows on and he don't go back to see whether she is leaking or not, unless he ties up, and he would not have known. If he suspicions the scow is leaky he would go to shelter with her (Rec. p. 74).

Then when the light on the scow disappeared, warning those on the tug of trouble, the master of the tug immediately shortened hawser and, finding the load spilled, sent for assistance.

The wind on the night in question, had reached its maximum velocity of sixteen miles an hour at

two o'clock a. m., which was four miles an hour under what, to-wit twenty miles, the Government meterologist in charge of the weather bureau at Seattle, witness for claimant, testified (brought out on redirect examination by claimant) becomes dangerous to towing, that is becomes a hindrance—that that was the general understanding he had from towboat men (Rec. 122).

Outside of the testimony of Hancher, witness for claimant, whose experience was that of a gasoline boat operator, who testified that he would not have gone out that night with a loaded scow but who also testified that the tug DEFENDER would be able to pull against the wind (on that night, with that scow CLAIRE and 290,000 feet of lumber) all right, there was no testimony on the part of any witness of nautical experience and good seamanship or otherwise condemning the judgment of the master of the tug in leaving Priest Point and entering the waters of Puget Sound—with the condition of wind and weather prevailing.

And in the absence of such testimony it cannot be held that the tug or petitioner is liable because the tug encountered rough weather, if it did.

> "Masters of tugs are not to be charged with negligence unless they make a decision which

nautical experience and good seamanship would condemn as presumably inexpedient and unjustifiable at the time and under the particular circumstances."

The Nannie Lamberton, 85 Fed. 983, C. C. A. 2nd Circuit.

Even assuming for the sake of the argument that the master's decision to proceed on the voyage from Priest Point was an error in judgment under the particular circumstances existing, neither the honesty of his intent nor the reasonableness of his discretion being impeached, the petitioner would not be liable for the loss complained of merely on account of that error of judgment.

"Such an error of judgment would not be a fault."

The William E. Gladwish, 196 Fed. 490, C. C. A. 2nd Circuit.

V.

Seaworthiness of Scow.

As to the 1st Assignment of Error.

The scow was chartered by claimant for the purpose of transporting a cargo of lumber from the Canyon Mill to Port Blakeley, and as such charterer the claimant was owner *pro hac vice.*

Claimant attempted to show that the scow was

seaworthy and properly loaded.

Claimant's evidence was to effect: that it was Niemeyer's duty to load and inspect the scow (Wilson for defendant, Rec. 35); and Wilson's duty to attend to anything necessary to be done (Id.). And that the scow was absolutely seaworthy (Niemeyer, Rec. 51). But neither Wilson nor Niemeyer were shipbuilders nor seafaring men; Niemeyer's testimony was incomplete, and was objected to at the time on that ground (Rec. pp. 50, 51, 52).

It is admitted that the scow, five or six hours after leaving Priest Point, became partly submerged. A damaged condition, sufficient to cause the same, was disclosed at a survey some fortnight thereafter at Port Blakeley.

But the actual cause of that damaged condition, when and where and how it came about or that such condition and not something else caused the loss of the lumber from the scow (Hancher, for claimant, thought that condition arose after the delivery of scow at Port Blakeley, Rec. 70 lines 4-7) is not shown by claimant, though the burden of making such showing, if true, is upon it.

There was no stress of weather, wind or sea, sufficient to cause that condition, after leaving Priest

Point, and no intervening cause on the river between the mill and Priest Point.

The claimant has failed to sustain the burden of proof.

If we were to indulge in theories to account for the disaster, it might be that the cargo first shifted owing to poor loading or want of proper stanchions on the scow to keep it in place, and then gradually spilled, listing the scow to starboard and submerging her stern, when she filled through the hatches; or that the scow, being old, worked in the seaway and puked the caulking out of her seams, filled with water and, listing, spilled her cargo; or that some of her seams were open before the tug hooked on to her at the Canyon mill and that when she got in the wash of the sea she leaked through those open seams; in any of which cases it would be a case of an unseaworthy scow.

Be that as it may, in the absence of any evidence of a sufficient intervening cause to explain the spilling of the cargo, the presumption is that the scow was unseaworthy at the commencement of the voyage, and the claimant, being charterer and owner *pro hac vice* of the scow and charged with the knowledge of her condition at that time, cannot be

heard to complain of a loss resulting from such condition not communicated to the tug before the commencement of the voyage or at all.

If it should be urged that it was the duty of the master of the tug to see that the scow was seaworthy and fit to proceed to sea before commencing the voyage, our answer is:

That the master of a tug is not responsible for the stowage of the cargo or the effects of bad stowage, where he has taken no part in the operation and has had no notice of bad stowage; and as to the condition of the scow itself, unless advised by those engaging his services of any unusual condition, the master is not expected to make an examination of the hull of the scow.

In the instant case, the master testified that he sounded for water at the mill and there was not enough for the siphon to lift (Rec. 90), that there was no change in condition of scow at Priest Point (Rec. 92, 93), and that from what he could see of the scow he assumed that she was in good seaworthy condition (Rec. 97).

If the hole in the stern of the scow, discovered at Port Blakeley, was in the scow at the time of her loading at Everett, it was where you could see

it only if you were low enough down to look at it, couldn't see it unless on same level with the scow (Ames, for claimant, Rec. 44); could be plainly seen from the outside if you were down on a level with it; if you got down and looked, that is the only way you could see it, you would have to lay over the end, would not say that you could see it plainly (Niemeyer, for claimant, Rec. 52, 53).

That was because there was a sheer or cutaway at the end of the scow; the hole was about fourteen to fifteen inches from the top (Clark, for claimant, Rec. 26); fifteen to eighteen inches below the deck (Wilson, for claimant, Rec. 38).

The end of the scow, as it lay in the little notch in the mill dock, would not be visible, it was too close to the dock, at the stern, which was the down stream end of the scow in the dock (Exhibit A).

Hancher, for claimant, who tows for claimant, (Rec. 60), says:

> "Anybody that tows a scow and wants to use precaution at all ought to examine the scow; take up the hatch and go down inside to see if there is any water in her. Some scows when you go after them, they have already put on hatches and caulked them down and you couldn't get at them, then the only way is to put a pike pole down the well to see if there is any water in them" (Rec. 61).

(This, it will be remembered, the master of the tug did.)

> "As to other ways to examine a scow to ascertain whether or not she had an open place in seams, was to look around on outside, but you wouldn't be apt to examine the outside of a scow unless she had a heavy list at one corner or something, then we would be apt to look to see what the trouble was (Rec. 61). Assuming there was an opening in the scow, you would be very apt to notice that if you went inside and examined the scow all through, but you would not be apt to make that close an examination, unless you knew she had water in her (Rec. 61, 62). The only way you would discover (the hole) would be by making a minute examination of the scow and there is no captain that does that who is handling the scow unless they know something has happened to the scow. (If the opening is above the water line) a man might go into the scow and not notice it. (With the scow up against the dock), it is dark, you might have a hole there big enough to stick your hand through and not see it (Rec. 62). If not dark at side of scow, opening of that size, by making ordinary investigation, by looking in the compartment, you could plainly see it, if you went down in there and went clear through the scow, which very few people do. A man would have no occasion to go into the scow (Rec. 62). Could see a hole three or four inches wide and six or seven feet long, if you look right at it. He would see it if he went down there looking for it and trying to find it" (Rec. 63).

This is the claimant's testimony as to the measure of the duty of the master of the tug in

determining whether or not his tow is in fit condition to make the voyage, where the tow is a scow.

We submit that the master of the DEFENDER discharged the full measure of his duty to the scow CLAIRE.

Furthermore, if the planks of the scow had pulled apart and caused the opening on account of age, as suggested by the boat builder Johnson, witness for claimant, (second answer on page 83 of the Record), the claimant being the charterer and owner *per hac vice* was charged with the knowledge of the condition of the scow and, if unseaworthy, cannot hold the tug or petitioner for any loss of cargo resulting therefrom particularly where such condition was not disclosed by claimant to the tug.

Johnson further testified regarding his survey of the scow on direct examination by claimant:

> "I was looking at the outside where the water might have gone into the scow, and I found that and I thought that was enough to sink the scow at the time she was out."
>
> * * * * * * * * *
>
> "(Whether opening had been caused by presence from within or without) that I could not tell. * * * The sea was so big and the oakum was so loose it would have come out very easy with the pressure of the storm" (Rec. 82).
>
> "In places where the (deck) planks, you

see there they get kind of worked down and the corners kind of broken off."

Q. Enough to take water in if awash?

A. Yes (Rec. 83).

When disaster overtakes a vessel at the beginning of the voyage without stress of weather or other adequate cause, the presumption is that she was unseaworthy when the voyage commenced.

S. S. Wellesly vs. Hooper & Co., 185 Fed. 733, C. C. A. 9th Circuit.

If a defect without any apparent cause be developed it is to be presumed it existed when the service began.

Work vs. Leathers, 97 U. S. 379.

As to what constitutes seaworthiness, it has been uniformly held that if a vessel springs a leak and founders, soon after starting upon her voyage without having encountered any storm or other peril to which the leak can be attributed, the presumption is that she was unseaworthy when she sailed.

Du Pont De Nemours vs. Vance, 19 How. 162.

VI.

Duty of the Tug Under Towage Contract.

As to the 7th Assignment of Error.

The trial court held that it was the duty of

petitioner to deliver the cargo at Port Blakely and it could not relieve itself from liability by placing the timbers in a boom at Everett and notifying the claimant of that fact.

We will admit that if the loss of the cargo was due to the negligence of the tug, any expense incurred in salving the spilled lumber would be a charge to be borne by petitioner as a consequence flowing from such negligence.

The towage contract was to tow a scow loaded with lumber—not a divisible contract to tow the scow and also to transport the lumber.

Only as the lumber constituted the cargo of the scow laden aboard the scow did the petitioner have any relation to it.

When the scow and its cargo became separated, that is when the lumber ceased to be cargo, then in the absence of any fault on the part of the tug, the petitioner had no duty respecting it as it lay impounded at Everett further than to give notice to claimant as to its whereabouts after it ceased to be cargo.

It then became claimant's duty to look after its own and failure to do so followed by subsequent loss through no fault of petitioner would be at claim-

ant's risk; petitioner would be without liability in the matter.

VII.

Damage.

As to the 6th, 7th and 9th Assignments of Error.

It was agreed between counsel that the cargo of lumber on scow at mill consisted of

	1,085 pieces	294,228 ft.	(Rec. 24, 59, 109)
delivered at Port Blakeley	185 pieces	46,022 ft.	(Rec. 59, 109)
not delivered that each piece averaged 275 ft. (Test. of Mitchell, Rec. 111)	900 pieces	248,206 ft.	(Rec. 109)
totally lost	34 pieces	9,350 ft.	(Rec. 59)
salved and impounded in boom at Everett	866 pieces	238,856 ft.	

Mitchell, manager for claimant, testified that he saw at Everett, in the boom, from 120 to 200 pieces (Rec. 114), that the corners of the sticks were rounded and badly chafed, rock-chafed (Rec. 113); total loss to claimant (Rec. 113); that the market value on Puget Sound was same as export value (Rec. 112); had market value after reconditioning (Rec. 113); would cost as much to recondition as original cost (Rec. 113).

Hayley, supervisor for Pacific Lumber Inspection Bureau, witness for petitioner, testified that he inspected the timber at Everett (Rec. 138).

It was stipulated that the lumber inspected by Hayley was the timbers lost off the CLAIRE (Rec. 146).

Hayley testified as to their condition, that they were a little worn, needed a little trimming, only three sticks in all damaged (Rec. 139); rest of timber in pretty good condition (Rec. 140); one man in one day could have retrimmed the damaged sticks with a cross cut saw, (as they lay in the water) (Rec. 140, 141); that he would have passed the timbers and issued usual certificate of inspection for export trade after such retrimming, if in loading they turned out to be what they appeared to be (Rec. 139).

There had been urgent need on part of claimant for delivery of the lumber at the time it was shipped in December, 1918, for the reason that the ship which was to carry it foreign was at Port Blakely on demurrage (Mitchell, for claimant, Rec. 119).

In January or February, 1919, after completion of the salving operation, no doubt after the ship had been loaded and sailed, the claimant was not in such urgent need of that cargo that was salved, which he was advised by petitioner was then impounded at Everett.

We submit that the unimpeached testimony of Hayley, a disinterested witness, outweighs the testimony of Mitchell, an interested witness; and that the claimant has not sustained the burden of proof on the question of damage.

Assuming for the sake of the argument that the spilling of the scow's cargo was due to the tug's negligence, it was the duty of claimant upon being advised the spilled lumber was impounded at Everett, to minimize the loss it sustained by reconditioning the timbers if their value after such reconditioning would warrant such expense.

We submit that the evidence shows that the expense of reconditioning was nominal and the recovery by claimant, if any, should be limited to what the evidence shows would have been the cost of reconditioning to which should be added the difference between the market value of the lumber delivered by the Canyon Lumber Company at its mill and its market value when reconditioned, if the latter value was the less. Or to put it another way, the original market value less proceeds of salvage after paying cost of reconditioning.

VIII.

The Decree.

As to the 10th and 11th Assignments of Error.

We submit that the claimant has failed to make out its case against the petitioner on any point. It has not sustained the burden of proof: (1) that the scow hit the bank; (2) if the scow hit this bank, that such impact caused any damage or caused the scow to leak; (3) that the turbulent waters of Puget Sound caused any damage; (4) that those in charge of the tug were guilty of any negligence; that it sustained the damage complained of.

The decree should therefore be reversed and a decree directed to be entered adjudging petitioner and its tug not liable at all for the damages and for costs.

Respectfully submitted,

WILLIAM H. GORHAM,
Proctor for Petitioner-Appellant.